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December 22, 2016

Mr. Jeff S. Jordan
Assistant General Counsel
Office of Complaints Examination
and Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 7177

Dear Mr. Jordan:

This letter responds on behalf of the Colorado Democratic Party ("CDP") to the Commission's notification that it received a complaint (the "Complaint") that indicates the CDP may have violated the Federal Election Campaign Act of 1971 (the "Act"). As described below, based upon the facts of the Complaint and other information available, there is no reason to believe that the CDP has violated the Act or any of the Commission's regulations.

I. Introduction to Allegations

The Foundation for Accountability and Civic Trust ("FACT") filed this Complaint against the CDP, Carroll for Colorado, the Democratic Congressional Campaign Committee ("DCCC"), and Hillary for America as related to "Won't Stand Up for You", an advertisement paid for by the CDP and Carroll for Colorado (the "Advertisement"). The Advertisement includes one narrative to attack and oppose Donald Trump as a presidential candidate, and another to support Morgan Carroll by attacking Representative Mike Coffman, her opponent for the U.S. House of Representatives in Colorado. The CDP wished to pay for the portion of the Advertisement that opposed Donald Trump. The Advertisement discloses that it was paid for by both Carroll for Colorado and the CDP.¹ The Complaint alleges that the Advertisement is not a "hybrid communication" and that it is a coordinated communication that qualifies as an in-kind contribution to both Carroll for Colorado and Hillary for America.

¹ "Won't Stand Up for You," September 27, 2016, available at <https://www.youtube.com/watch?v=7KxcnuejChU&feature=youtu.be> (last accessed November 18, 2016).

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II. The Advertisement is a Neither a Hybrid Communication, Nor is it an In-Kind Contribution to Carroll for Colorado

The Complaint provides a lengthy argument to allege that the Advertisement is not a hybrid communication.² However, within this irrelevant discussion, the Complaint fails to recognize that it cites to relevant Commission guidance for how two entities should allocate costs spent on a shared communication.³ The Commission has described the “general rule” for the “basic principle behind two entities sharing the cost of a mutually beneficial, single communication” as being derived from 11 C.F.R. § 106.1, which provides that:

Expenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.⁴

In Advisory Opinion 2004-01, the Commission applied 11 C.F.R. 106.1(a)(1) to find that for broadcast communications “like” the one under review that are made within 120 days of a presidential primary, if “all of the production and distribution of costs” were attributed using the time and space method under 11 C.F.R. 106.1(a)(1), and if the presidential candidate's committee were to reimburse the other committee for its attribution, then there would be no contribution

² The Complaint writes that “[t]here is no ‘new legal guidance’ from the Commission on [hybrid communications]. The referenced ‘decade-old FEC precedent’ does *not* permit the substitute standard ‘generic party reference’ with material expressly advocating the defeat of Donald Trump while still attributing a portion of the costs of the advertisement to the CDP.” Complaint at 2. The Complaint’s following argument to support the allegation that the Advertisement does not have a “generic party reference” is therefore not relevant since this Response agrees this is not a hybrid communication, but provides that the costs of the Advertisement were properly allocated.

³ See Complaint at 3 (citing Advisory Opinion 2006-11 with references to 11 C.F.R. § 106.1). See Advisory Opinion 2006-11 at 4 (“Advocacy related to the election of the clearly identified candidate is the most salient feature of such a communication, as compared to the generic reference to the party’s candidates. . .”). The Complaint also cites to an audit dissent by Commissioner Weintraub, but in her discussion on hybrid communications, Commissioner Weintraub provides that her concern was that there was “rarely, if ever, a reference to any unnamed groups of candidates who could receive a benefit from the generic message” and “[i]f no other candidates receive a benefit, then the entirety of the communication has served to benefit the named candidate, and that candidate should be required to pay for the advertisement.” Audit Report, Bush-Cheney '04, Inc. Statement of Commissioner Ellen L. Weintraub at 4 (March 22, 2007), available at <http://www.fec.gov/members/weintraub/audits/statement20070322.pdf> (last accessed December 14, 2016); see Complaint at 4. Here, argument over a “generic reference” is not relevant – and appears if anything to support the conclusions reached in this Response. This Advertisement clearly identifies both Morgan Carroll and Donald Trump, and therefore it is not an applicable concern that the entirety of the message is in favor of one candidate due to only one being clearly identified, and the other being an unnamed group of candidates.

⁴ 11 C.F.R. § 106.1(a)(1); see Advisory Opinion 2006-11 at 3; Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spokovsky on Final Audit Report on Bush-Cheney '04, Inc. at 2, available at http://www.fec.gov/audits/2004/20070322bush_cheney_stmt_02.pdf (last accessed December 2, 2016).

from one committee to the other.⁵ To be certain, the Commission explained that the attribution of costs “shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.”⁶ In the Opinion, the Commission was considering a broadcast communication where a presidential candidate would appear to endorse a congressional candidate.

Here, the facts are similar to those in Advisory Opinion 2004-01 and the two committees similarly allocated the costs of the Advertisement appropriately. The Advertisement aired within 120 days of a presidential election, “promotes” and “supports” Morgan Carroll as a clearly identified federal candidate, and “attacks” and “opposes” Donald Trump in accordance with 11 C.F.R. § 100.24.⁷ While here the cost was allocated between a state party and a candidate’s authorized committee as opposed to two authorized committees as in Advisory Opinion 2004-01, Commission precedent shows that the allocation of costs was appropriate and necessary given its precedent of applying 11 C.F.R § 106.1 broadly.⁸ Given Advisory Opinion 2004-01 dealt with similar facts to those in this matter, it is both necessary and appropriate that the CDP and Carroll for Colorado allocated the costs for the Advertisement based on the time devoted supporting Morgan Carroll and attacking Donald Trump, with no contribution being made from one party to the other.

As a result, the Advertisement was paid for appropriately using the “*basic principle*” of cost sharing between entities when more than one federal candidate is referenced. The Complaint’s argument for why the Advertisement is not a hybrid communication is not relevant, and overlooks this general rule.

III. The Advertisement is Not an In-Kind Contribution to Hillary for America

A public communication may be treated as an in-kind contribution to a candidate if the communication is “coordinated” with the candidate, the candidate’s committee, or one of their agents. Commission regulations provide a three-prong test to determine whether a public communication is a “party coordinated communication”. First, the political party committee must have paid for the communication;⁹ second, the communication must meet at least one of the

⁵ Advisory Opinion 2004-01 at 6.

⁶ Advisory Opinion 2004-01 at 6.

⁷ Under 11 C.F.R. § 100.24(b)(3), a public communication “promotes or supports, or attacks or opposes any candidate for Federal office . . . whether or not the communication expressly advocates a vote for or against a Federal candidate.”

⁸ See, e.g., Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spokovsky on Final Audit Report on Bush-Cheney '04, Inc. at 2 (“Although this regulation applies specifically to communications made jointly by two or more candidates, the Commission has consistently and repeatedly applied the principle of § 106.1 to situations not explicitly captured by the language of the regulation.”);

⁹ 11 CFR § 109.37(a)(1).

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Commission's defined "content standards";¹⁰ and third, the communication must meet at least one "conduct standard".¹¹ To be certain, a public communication must meet *all three prongs* of the test in order to be a coordinated communication.

The "conduct standard" test provides different types of behavior that constitute coordination – none of which does the Complaint allege, and none of which has the CDP engaged in. Specifically, the law provides that the following conduct would qualify as coordination:

- (1) The communication is created, produced, or distributed at the **request, suggestion, or assent** of a candidate, authorized committee, or political party committee;¹²
- (2) The candidate, authorized committee, or political party committee is **materially involved in**:
 - (i) The content of the communication;
 - (ii) The intended audience for the communication;
 - (iii) The means or mode of the communication;
 - (iv) The specific media outlet used for the communication;
 - (v) The timing or frequency of the communication; or
 - (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite."¹³
- (3) "The communication is created, produced, or distributed after **one or more substantial discussions** about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. *A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed*

¹⁰ Since this advertisement referenced then-Presidential nominee Donald Trump and was publicly disseminated during the regulated period, the CDP recognizes that these basic facts would satisfy the "content" standard. See 11 C.F.R. § 109.37(a)(2)(iii)(B).

¹¹ 11 C.F.R. § 109.37(a)(3); see 11 CFR § 109.21(d)(1)-(6).

¹² 11 C.F.R. § 109.21(d)(1).

¹³ 11 C.F.R. § 109.21(d)(2)(i)-(vi).

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to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication."¹⁴

- (4) A "common vendor" has provided certain services to the candidate "clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days."¹⁵

The Complaint does not provide any specific allegation to indicate how the "conduct" standard may have been met in order for the Advertisement to constitute a coordinated communication. Instead, the complaint merely alleges that "... in light of the close and ongoing coordination occurring between the CDP and Hillary for America" the CDP coordinated with Hillary for America, and in a footnote makes a vague notation to allege the conduct standard was met because there was "material involvement and substantial discussion."¹⁶ There is no further elaboration on when and with whom this involvement or discussion allegedly occurred. **Hillary for America and the CDP did not engage in any of the behavior listed above.**

To be certain, there was no "insider information" shared between Hillary Clinton/Hillary for America and the CDP related to this Advertisement. The Advertisement was not made at the request, suggestion, or assent of Hillary Clinton or Hillary for America; neither Hillary Clinton nor Hillary for America was materially involved in the Advertisement; and neither engaged in any substantial discussions with the CDP related to the Advertisement. Neither Hillary Clinton nor Hillary for America conveyed any information related to her "plans, projects, activities, or needs" in any way "material to the creation, production, or distribution" of the Advertisement.¹⁷ Additionally, it is the understanding that that the vendor who worked with the CDP on this Advertisement was not a "common vendor" with Hillary for America.

Instead of providing evidence of coordination, the Complaint includes an attached *Politico* article that discusses the Democratic Party's use of hybrid advertisements in 2016 races. The complaint purports that the article "suggests that the CDP in coordination with the DCCC and their candidates have *knowingly* adopted this new tactic [of hybrid ads] in spite of the fact that there is no legal justification for it. . . ."¹⁸ However, the article does not reference the CDP, Colorado, Hillary for America, Hillary Clinton or any of her agents, and provides no

¹⁴ 11 C.F.R. § 109.21(d)(3).

¹⁵ 11 C.F.R. § 109.21(d)(4). While this Response recognizes the Commission has two additional types of content standards under its rules, these do not seem relevant to address, and since the Complaint has made no specific allegation, not necessary.

¹⁶ Complaint at 5, n. 2.

¹⁷ 11 C.F.R. § 109.21(d)(3).

¹⁸ Complaint at 2.

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further evidence or allegation of any form of such coordinated conduct. Therefore, the Complaint does not sufficiently allege that the advertisement is a coordinated communication.

Attached to this Response is an affidavit signed by Rick Palacio, Chairman of the CDP, to affirm that there was no coordination between the CDP and Hillary for America with respect to this communication. *As a result, with the Complaint providing no evidence to support the vague allegation of coordinated communication, and the Response's sworn statement affirming no such coordination occurred, there is no reason to believe that the Advertisement was a coordinated communication. Accordingly, given the Advertisement was not coordinated, it does not amount to an in-kind contribution to Hillary for America.*

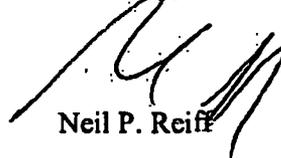
IV. Conclusion

The Advertisement is a public communication that promoted and supported Morgan Carroll as a candidate for the U.S. House of Representatives, and attacked and opposed Donald Trump as a presidential candidate. *As a result, it was necessary and proper for the cost of the Advertisement to be allocated between Carroll for Colorado and the CDP, with the CDP not making a contribution to Morgan Carroll because Carroll for Colorado paid for the portion of the Advertisement that supported her candidacy.*

The Complaint provides a lengthy and irrelevant argument for why the Advertisement is not a hybrid communication and fails to recognize that this communication was properly paid for under the allocation of cost principles of 11 C.F.R § 106.1. Additionally, this Advertisement was not coordinated in any way with Hillary Clinton or Hillary for America. The Complaint lacks an allegation for how or when any coordination may have occurred, and this Response is supplemented by a sworn statement from the CDP to affirm there was no such coordination.

Based upon the above, the Commission should immediately dismiss this matter. If you have any questions regarding this Response, my daytime number is (202) 479-1111. My email address is reiff@sandlerreiff.com.

Sincerely,



Neil P. Reiff

BEFORE THE FEDERAL ELECTION COMMISSION

Colorado Democratic Party)
and) MUR 7177
Rick Palacio as Chairman)

DECLARATION OF RICK PALACIO

1. My name is Rick Palacio, Chairman of the Colorado Democratic Party ("CDP").
During the 2016 election, I was the chairman of the CDP and have direct personal knowledge of the facts described below.
2. "Won't Stand Up for You" (the "Advertisement") started airing online through YouTube starting September 27. The Advertisement can be found here:
<https://www.youtube.com/watch?v=7KxcnuejChU>.
3. The Advertisement is split approximately evenly between two narratives.
Approximately one half of the Advertisement attacks and opposes Donald Trump as a presidential candidate and the other promotes and supports Morgan Carroll as a candidate for the U.S. House of Representatives by attacking her opponent, Representative Mike Coffman.
4. The CDP wished to pay for the portion of the Advertisement that attacked Donald Trump as a presidential candidate.
5. To the best of my knowledge, the total expense for the Advertisement was allocated between Carroll for Colorado and the CDP based upon the amount of time the Advertisement spent supporting Morgan Carroll and attacking Donald Trump.

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